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AZHAR CHE WIL

v.

PP

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FEDERAL COURT PUTRAJAYA

ARIFIN ZAKARIA CJ (MALAYA)

GHAZALI MOHD YUSOFF FCJ

RAUS SHARIF FCJ

[CRIMINAL APPEAL NO: 05-53-2009 (C)]

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22 MARCH 2010

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CRIMINAL PROCEDURE: Charge - Murder of 19 year-old detainee - Charge against seven prison officers under s. 302 Penal Code read together with s. 35 of same - Acquittal and discharge of six prison officers except for one - Whether charge against remaining officer rendered bad as reference to acquitted and discharged six and s. 35 Penal Code were not deleted - Whether remaining officer prejudiced - Whether deprived of right to recall witnesses

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CRIMINAL LAW: Penal Code - Murder - Section 302 read together with s. 35 - Charge against seven prison officers for murder of 19 year-old detainee - Acquittal and discharge of six prison officers except for one - Whether charge against remaining officer rendered bad as reference to acquitted and discharged six and s. 35 Penal Code were not deleted - Whether remaining officer prejudiced - Whether deprived of right to recall witnesses

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The deceased was a 19 year-old detainee who escaped from the Penor Prison in Kuantan only to be re-captured and brought back to prison. It was in evidence that a few prison officers (co-accused persons at the trial) assaulted the deceased upon his re-capture before they brought him to a room called the 'Bilik Unit Kawalan Keselamatan Penjara' ('UKK room'). In the UKK room, according to the testimony of a prosecution witness, the deceased was made to sit on the floor and his hands handcuffed at the back. The appellant was said to have kicked and stomped the head of the deceased and chest several times causing the deceased's head to hit the concrete wall and floor of the room. The deceased then went into a seizure and lapsed into a coma. When taken to hospital, the deceased died without regaining consciousness. At the trial, the 6th accused was acquitted and discharged upon the Public Prosecutor's

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submission that no *prima facie* case was made out against him. The trial judge found that only the appellant was answerable for the death of the deceased thereby convicting him and sentencing him to death. The remaining six were acquitted and discharged. The appellant's appeal to the Court of Appeal was dismissed and the appellant now appealed before this court. It was argued for the appellant that since the appellant was jointly charged together with the other co-accused involving s. 35 Penal Code ('PC'), the trial judge should have amended the charge when he called the appellant to enter his defence by deleting all reference in the charge to the acquitted and discharged co-accused persons and s. 35 PC. It was further submitted that by not amending the charge, the appellant was deprived of his right to recall witnesses and that had caused a miscarriage of justice.

Held (dismissing the appeal)

Per Raus Sharif FCJ delivering the judgment of the court:

- (1) Section 35 PC did not create a substantive offence but merely a rule of evidence open to the prosecution when several accused persons were alleged to be involved in the commission of an offence (See *Harcharan Singh a/l Piara Singh and Another*). (para 24)
- (2) The only incident that indicated where, when and how the fatal injury was inflicted on the deceased was the incident at the UKK room. The evidence showed that the fatal injury was inflicted by the appellant and that the other incidents of assaults by the appellant's co-accused could not have caused the death of the deceased. Therefore, when all the co-accused were acquitted and only the appellant was ordered to enter his defence, the appellant must be aware of the evidence against him. That was especially so when he was represented by counsel. (para 28)
- (3) The appellant was in no way misled or prejudiced by the non-amendment of the charge. The way the defence was presented made it amply clear that the appellant fully appreciated the nature of the charge against him and the nature of the prosecution's case. He elected to give evidence on oath and in his defence, alleged that the deceased was already in a very weak condition before entering the UKK room as he had to be assisted to walk into the room. However, the trial judge found

- A as a fact that there was no evidence to suggest that the deceased was already seriously injured prior to him being brought to the room. On the contrary, the trial judge found that there was evidence of several witnesses to show that the deceased was able to walk on his own in a normal manner and
- B unaided to the UKK room. (para 29)
- (4) Cases had shown that even if a charge was amended but an accused person was represented by counsel, the trial judge was not obliged to inform the accused person of his right under
- C s. 162 Criminal Procedure Code to recall any of the witnesses for the prosecution. Where an accused was represented by counsel, it was unnecessary for the court to draw counsel's attention to s. 162 or to inquire whether counsel intended to exercise the right conferred by the section (See *Msimanga Lesaly v. PP*). In the present case, the appellant was represented by
- D counsel and even though the charge was not amended, there was nothing to prevent the defence from recalling or re-summoning any witness or to call further evidence. That was not done. Therefore, the question of miscarriage of justice did not arise. (paras 30, 31 & 32)
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- (5) The fact that the co-accused persons were acquitted had no bearing upon the case against the appellant. Accordingly, there was nothing irregular as regard the conviction of the appellant on the charge of murder. (para 33)
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Bahasa Malaysia Translation Of Headnotes

- Si mati adalah seorang banduan berumur 19 tahun yang telah melarikan diri dari Penjara Penor, Kuantan, tetapi berjaya ditangkap semula kemudiannya. Keterangan telah dikemukakan bahawa selepas ditangkap semula, si mati telah didera oleh beberapa pegawai penjara (tertuduh-tertuduh bersama di perbicaraan) sebelum di bawa ke bilik yang dipanggil Bilik Unit Kawalan Keselamatan Penjara ('bilik UKK'). Menurut keterangan seorang saksi pendakwa, di dalam bilik
- G UKK tersebut, si mati telah dipaksa duduk di atas lantai dengan tangannya digari ke belakang. Perayu dikatakan telah beberapa kali menendang dan memijak kepada dan dada si mati sekaligus menyebabkan kepala si mati terhantuk ke dinding dan lantai konkrit bilik. Berikutnya si mati telah menggelupur dan tidak sedarkan diri.
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- I Si mati kemudian dihantar ke hospital dan meninggal dunia tanpa

sedarkan diri. Di perbicaraan, tertuduh keenam telah dibebaskan dan dilepaskan ekoran hujah Pendakwa Raya bahawa tiada kes *prima facie* dibuktikan terhadapnya. Hakim bicara mendapati bahawa hanya perayu seorang sahaja yang bertanggungjawab terhadap kematian si mati dan sekaligus mensabit dan menjatuhkan hukuman mati terhadapnya, sementara keenam-enam tertuduh lain telah dibebaskan dan dilepaskan. Rayuan perayu ke Mahkamah Rayuan telah ditolak dan perayu kini merayu ke mahkamah ini. Ianya diujahkan bagi pihak perayu bahawa oleh kerana perayu telah dituduh secara bersesama dengan tertuduh-tertuduh lain yang melibatkan s. 35 Kanun Keseksaan ('KK'), maka hakim bicara sepatutnya meminda pertuduhan sewaktu memanggil perayu untuk membela diri, iaitu dengan menghapuskan segala rujukan mengenai tertuduh-tertuduh yang dibebaskan dan s. 35 KK. Dihujahkan seterusnya bahawa, dengan tidak meminda pertuduhan, perayu telah dinafikan haknya untuk memanggil saksi-saksi dan itu telah membawa kepada salahlaksana keadilan.

Diputuskan (menolak rayuan)

Oleh Raus Sharif HMP menyampaikan penghakiman mahkamah:

- (1) Seksyen 35 KK tidak mencipta kesalahan substantif tetapi hanyalah satu kaedah keterangan yang terbuka kepada pihak pendakwaan apabila beberapa orang tertuduh didakwa terlibat dalam perlakuan sesuatu kesalahan. (Lihat *Harcharan Singh a/l Piara Singh and Another*).
- (2) Satu-satunya insiden yang menunjukkan di mana, bila dan bagaimana kecederaan fatal tersebut dilakukan terhadap si mati adalah insiden di dalam bilik UKK. Keterangan menunjukkan bahawa kecederaan fatal tersebut dilakukan oleh perayu dan bahawa insiden-insiden penderaan yang lain oleh tertuduh-tertuduh bersama tidak boleh menyebabkan kematian si mati. Oleh itu, apabila kesemua tertuduh-tertuduh bersama dibebaskan dan hanya perayu yang dipanggil membela diri, perayu seharusnya tahu mengenai keterangan terhadapnya. Sementelah beliau diwakili oleh peguam.
- (3) Kegagalan meminda pertuduhan sekali-kali tidak mengeliru atau memprejudiskan perayu. Kaedah bagaimana pembelaan dikemukakan menunjukkan bahawa perayu memahami sepenuhnya sifat pertuduhan yang dihadapi serta sifat kes pendakwaan. Beliau memilih untuk memberi keterangan secara

- A bersumpah dan dalam keterangannya mendakwa bahawa si mati sudah berkeadaan amat lemah sebelum dibawa ke bilik UKK lagi dan perlu dipapah memasuki bilik tersebut. Bagaimanapun, hakim bicara mendapati sebagai satu fakta bahawa tiada keterangan yang menunjukkan bahawa si mati sudah cedera parah sebelum dibawa ke bilik tersebut. Hakim bicara sebaliknya mendapati terdapat keterangan dari beberapa saksi yang menunjukkan bahawa si mati masih boleh berjalan sendiri secara biasa dan tidak dibantu ke bilik UKK.
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- C (4) Kes-kes menunjukkan bahawa di mana pertuduhan dipinda dan tertuduh diwakili oleh peguam, hakim bicara tidak bertanggungjawab untuk memberitahu tertuduh akan haknya di bawah s. 162 Kanun Tatacara Jenayah untuk memanggil semula saksi-saksi pendakwaan. Di mana seorang tertuduh diwakili oleh peguam, adalah tidak perlu bagi mahkamah menyedarkan peguam mengenai s. 162 atau bertanya sama ada peguam berhasrat untuk menggunakan hak yang diberi oleh seksyen tersebut (lihat *Msimanga Lesaly v. PP*). Dalam kes semasa, perayu telah diwakili oleh peguam, dan walaupun pertuduhan tidak dipinda, tiada apa-apa pun yang menghalang pembelaan dari memanggil semula mana-mana saksi ataupun mengemukakan keterangan lanjut. Ini tidak dilakukan and oleh itu soal salahlaksana keadilan tidak berbangkit.
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- F (5) Fakta bahawa tertuduh-tertuduh bersama telah dibebaskan tidak mempunyai sebarang kesan pada kes yang dihadapi perayu. Oleh itu, tiada apa pun yang tidak teratur mengenai pensabitan perayu atas pertuduhan membunuh.

Case(s) referred to:

- G *C Mohammad v. PP* [1974] 1 MLJ 25 (*refd*)
Hj Maamor Hj Abdul Manap v. PP [2003] 1 CLJ 370 HC (*refd*)
Lee Swee Tee v. PP [1960] 1 LNS 58 HC (*refd*)
Msimanga Lesaly v. PP [2005] 1 CLJ 398 CA (*refd*)
Moosa Abdul Rahman v. The State of Kerala [1982] Cr LJ 1384 (*refd*)
PP v. Harcharan Singh Piara Singh and Another (Rayuan Jenayah No: 05-22-2004 (B)) (Unreported) (*refd*)
Quek Ching Kim v. Regina [1955] 1 LNS 104 HC (*refd*)
Re Tan Boon Liat & Anor; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Other Appeals [1977] 1 LNS 110 FC (*refd*)
Teh Thiam Huat v. PP [1996] 3 SLR 631 (*refd*)
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Legislation referred to:

Criminal Procedure Code, ss. 158, 162, 422

Penal Code, ss. 34, 35, 302

Criminal Procedure Code 1974 [Ind], s. 217

*For the appellant - Karpal Singh (Sangeet Kaur Deo with him); M/s Karpal Singh & Co**For the respondent - Saiful Edris Zainuddin DPP**Reported by Usha Thiagarajah*

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JUDGMENT**Raus Sharif FCJ:****Introduction**

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[1] The appellant and six (6) other accused persons were charged for murder under s. 302 of the Penal Code read together with s. 35 of the same Code. The charge reads as follows:

Bahawa kamu bersama-sama pada tarikh 1.3.2004, di antara jam pukul 4.00 petang hingga 7.00 petang, bertempat di Penjara Penor, di dalam Daerah Kuantan, di dalam Negeri Pahang Darul Makmur, telah melakukan pembunuhan ke atas Mohd Shukri bin Mohd Yusof, KP No. 850404-06-5179, dengan itu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 dibaca bersama seksyen 35 Kanun Keseksaan.

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[2] In the High Court, the appellant, Azhar bin Che Wil was named as the 1st accused. The other accused persons charged with him were Teyun Thian Eim (2nd accused), Suhaimi bin Nordin (3rd accused), Mohamad Hamdan bin Mohd Yaakob (4th accused), Ahmad Rizal bin Ab. Halim (5th accused), Shamsul Darniza bin Ismail (6th accused) and Ismail @ Mat Daud bin Deris (7th accused). In this appeal, for ease of reference, they will be referred to as they were in the High Court.

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[3] All the accused persons were prison officers and personnel from Penor Prison, Kuantan.

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A Background Facts

- B** [4] What had happened in this case was this. On 1 March 2004, at about 4pm a remand prisoner at Penor Prison, Kuantan, Mohd Shukri bin Mohd Yusof (“the deceased”) attempted to escape. He was then 19 years old. The attempt was discovered and the prison alarm was raised. At about 4.45pm ie, about 45 minutes later, the prison officers managed to apprehend the deceased in an area known as Zone Nenas. From there, he was brought through a football field to the main gate of the prison.
- C** [5] It was the prosecution’s case that a few prison officers assaulted the deceased while he was at Zone Nenas, at the football field and at the main gate. From the main gate, the deceased was taken to the prison lock-up. At about 5.20pm, the 1st accused, who was the Head of the Security Unit, directed his subordinate prison officer, Razak bin Fauzi (PW7) to bring the deceased to a room known as Bilik Unit Kawalan Keselamatan Penjara (“UKK room”).
- D** When the deceased was brought to the UKK room, four prison officers were already there. The 1st accused then ordered the prison officers to leave the room with the exception of PW7.
- E** [6] In the UKK room, the deceased was made to sit on the floor. His hands were handcuffed at the back. PW7 testified that he saw the 1st accused putting on a pair of rubber gloves and thereafter began kicking and stomping the head of the deceased and his chest several times, causing the deceased’s head to hit the concrete wall and concrete floor of the room. PW7 also testified that he saw blood oozing from the deceased’s mouth and that he went into a seizure and lapsed into a coma.
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- G** [7] Seeing the condition of the deceased, the 1st accused instructed PW7 to call the prison medical assistant (PW8). PW8 arrived and advised the 1st accused to send the deceased to the hospital. At about 6.30pm, the deceased was taken by a prison van to the hospital. Accompanying the deceased were the 1st accused, PW7, PW8 and three other prison officers. They arrived at 7pm and throughout the journey the deceased remained in coma without regaining consciousness. He remained in that state until he died on 10 March 2004.

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[8] The pathologist and forensic expert, Dr. Zahari bin Noor (PW6) found the death of the deceased was caused by serious internal injury in the head, and that injury was caused by multiple blunt trauma to the head. The multiple blunt trauma had caused sub-arachnoid haemorrhage in the brain area.

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Decision Of The High Court

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[9] At the trial, before the commencement of submission at the close of the case for the prosecution, the learned Deputy Public Prosecutor conceded that no *prima facie* case had been made out against the 6th accused. The learned trial judge accordingly acquitted and discharged the 6th accused.

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[10] After hearing submissions by all parties, the learned trial judge made the following findings of facts:

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- (a) The person (“deceased”) named in the charge has died;
- (b) That the death of the deceased was caused by serious injury to the head that resulted in sub-arachnoid haemorrhage in the brain area. The injury to the head was caused by multiple blunt trauma to the head;
- (c) The deceased was the detainee who escaped from Penor Prison and his escape and re-capture started at 4.10pm on 1 March 2004;
- (d) In an area, within the Penor Prison compound known as Zone Nenas, the deceased was assaulted by the 3rd accused.
- (e) At the football field of the Penor Prison, the deceased was assaulted by the 4th and 5th accused.
- (f) At the main gate of Penor Prison, the deceased was assaulted by the 2nd and 7th accused.
- (g) At UKK room it was the 1st accused who assaulted the deceased.

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[11] The learned trial judge then concluded that by reflecting on the actual cause of death, namely, the multiple blunt trauma to the head, the only incident that clearly indicates where, when and how the said fatal injury was inflicted on the deceased was only the incident at the UKK room. In all the other incidents, he found no

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- A evidence to show such “multiple blunt trauma” to the head that can possibly cause the haemorrhage to the brain. Thus, by going through the process of elimination through the filtering process of combing the evidence adduced by the prosecution, the learned trial judge found that at the end of the process only the 1st accused should be answerable for causing the death of the deceased.
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- [12] The learned trial judge accordingly called the 1st accused to enter upon for his defence. The remaining five accused persons were acquitted and discharged without their defence being called. At the close of the defence case, the learned trial judge found the 1st accused guilty. He was convicted of the charge of murder and sentenced to death.
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Appeals

- D [13] The Public Prosecutor appealed against the acquittal of the 2nd, 3rd, 4th, 5th and 7th accused, while the 1st accused appealed against his conviction and sentence to the Court of Appeal.

- [14] On 5 May 2009, both appeals were dismissed by the Court of Appeal. The 1st accused, as well as the Public Prosecutor then appealed to this court against the decision of the Court of Appeal.
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- [15] We heard the Public Prosecutor’s appeal against the acquittal of the 2nd, 3rd, 4th, 5th and 7th accused on 8 December 2009. After hearing the parties, we dismissed the appeal. We affirmed the acquittal of the 2nd, 3rd, 4th, 5th and 7th accused.
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- [16] The appeal by the 1st accused was also heard on the same day. After hearing the parties, we adjourned the matter for our consideration and decision.
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Submissions

- [17] Before us, Mr Karpal Singh, learned counsel for the 1st accused raised only one issue. He submitted that the learned trial judge had erred in not amending the charge under s. 302 read with s. 35 to one under s. 302 only against the 1st accused at the close of the prosecution’s case after acquitting and discharging the 2nd, 3rd, 4th, 5th, 6th and 7th accused persons. Mr. Karpal Singh, argued that since the 1st accused was jointly charged together with other co-accused involving s. 35, the learned trial judge should have
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amended the charge when he called upon the 1st accused to enter his defence by deleting all reference in the charge to the other co-accused and s. 35. It was further submitted that by not amending the charge, the 1st accused was deprived of his right to recall witnesses and had caused a miscarriage of justice and thus the conviction and sentence of death cannot stand.

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[18] Our attention was brought to s. 158 and s. 162 of the Criminal Procedure Code which respectively state:

158 (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

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(2) Every such alteration or addition shall be read and explained to the accused.

162. Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also called any further evidence which may be material.

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[19] Mr. Karpal Singh then referred to us a number of cases on the applicability of s. 162 of the Criminal Procedure Code. These cases are *Quek Ching Kim v. Regina* [1955] 1 LNS 104, *Lee Swee Tee v. Public Prosecutor* [1960] 1 LNS 58, *C. Mohammad v. Public Prosecutor* [1974] 1 MLJ 25, *Hj Maamor Hj Abdul Manap v. PP* [2003] 1 CLJ 370, and *Re Tan Boon Liat @ Allen & Anor v. Menteri Hal Ehwal Dalam Negeri & Ors And Other Appeals* [1977] 1 LNS 110.

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[20] The learned Deputy Public Prosecutor, on the other hand submitted that the failure on the part of the learned trial judge to amend the charge either at the close of the prosecutor's case or at the close of the defence's case, so as to delete any reference in the charge to the other co-accused and to s. 35 is only a minor error and is curable under s. 422 of the Criminal Procedure Code. Section 422 reads:

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Irregularities not to vitiate proceedings

422. Subject to the provisions contained in this chapter no finding, sentence or order passed or made by the Court of competent jurisdiction shall be revised or altered on account of:

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A (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;

B (b) the want of any sanction, or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

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[21] He then referred to us to the recent Federal Court case, *PP v. Harcharan Singh a/l Piara Singh and Another* (unreported) Rayuan Jenayah No. 05-22-2004 (B) and *Msimanga Lesaly v. Public Prosecutor* [2005] 1 CLJ 398, which are cases on point to the issue raised by Mr. Karpal Singh.

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Findings

[22] In *Msimanga Lesaly v. PP* [2005] 1 CLJ 398, one of the issues raised was with regard to the charge which was not so perfectly amended as to get rid of all reference to the element of the appellant having acted with another. Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal held that it does not render the charge bad for s. 34 of the Penal Code does not create a substantive offence but merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. In the judgment, Gopal Sri Ram JCA, referred with approval to *Teh Thiam Huat v. Public Prosecutor* [1996] 3 SLR 631 where Karthigesu JA speaking for the Court of Appeal Singapore in dealing with the same subject said as follows:

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We should, however, mention that an issue was raised that as the capital charge of trafficking was a common intention charged and the learned judge having acquitted the other conspirator, Tay Bee Hoon, the conviction of the appellant without amending the charge was irregular. True, the learned judge did not amend the charge; he found that the appellant alone was in possession of the 40 sachets of heroin and that he failed to make good that he was in possession of the 40 sachets for his and Tay Bee Hoon's consumption. Suffice it to say that s. 34 of the Penal Code does not create a substantive offence; it lays down only a rule of evidence to infer joint responsibility per Thean J (as he then was)

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in *Chota bin Abd Razak v. PP* [1991] 3 MLJ 77; [1991] SLR 675. Accordingly, there was nothing irregular about the appellant's conviction on the capital charge of trafficking.

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[23] Recently, this court in *Public Prosecutor v. Harcharan Singh a/l Piara Singh and Another* (Rayuan Jenayah No. 02-22-2004 (B) reiterated the same point. In that case, *Harcharan Singh a/l Piara Singh* together with one Jasbir Singh were charged for murder under s. 302 of the Penal Code read together with s. 34 of the same Code. Both were convicted but on appeal their conviction were quashed and they were set free. The prosecution being dissatisfied with the result appealed to this court. In the meantime, Jasbir Singh, an Indian national returned to India after his acquittal. The notice of appeal was not able to be served on Jasbir Singh. After several attempts failed, the appeal against Jasbir Singh was withdrawn. The prosecution only pursued the appeal against Harcharan Singh. The issue raised was whether the appeal against Harcharan Singh can succeed when there is no appeal against Jasbir Singh, viewing the case in the light of the allegation of common intention under 34 of the Penal Code. Gopal Sri Ram FCJ, speaking for this court held:

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It is well established that section 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by plurality of persons. See *Teh Thiam Huat v. PP* [1996] 3 SLR 631. It follows that where two or more persons are charged with an offence and section 34 is prayed in aid to alleged common intention, the acquittal of all save one does not render the charge bad against that one who may be lawfully convicted on the charge which contains a reference to section 34.

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[24] Mr. Karpal Singh urged us to depart from *Harcharan Singh*. With respect, we find no justification to do so. We are of the view that the non deletion of reference to the co-accused and s. 35 in the charge either at the close of the prosecution's case or at the close of the defence's case does not render the charge bad in law. Section 35 like s. 34 does not create a substantive offence but merely a rule of evidence open to the prosecution when several accused persons are alleged to be involved in the commission of an offence.

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[25] Section 34 and s. 35 of the Penal Code are now reproduced in full. They say:

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A 34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

B 35. Whenever an act, which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

C [26] From the above, it is clear that s. 34 provides for a case in which a criminal act was done by several persons in furtherance of a common intention. However s. 35 refers to a situation where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention and each person is liable for the act to the extent of his knowledge or intention. Thus, under s. 35, the court has to consider what is the knowledge or intention of each person which joined in committing the act.

E [27] *Ratanlal & Dhirajlal's Law of Crimes* in their commentary on s. 35 illustrated the following examples:

F A and B beat C who dies. A intended to kill him and knew that the act would cause death. B only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. A is guilty of murder and B of causing grievous hurt. Where an assault is made with a sharp-edged or piercing weapon or with a firearm, the assailants may be presumed to know that the result of the causing of injuries with such weapons will very likely be death, and, if death actually results from the assault, everyone of the persons concerned in the act will be guilty of murder.

G [28] Taking the above illustrations to our case, it is clear that the only incident that indicates where, when and how the fatal injury was inflicted on the deceased was the incident at the UKK room. The fatal injury that caused the deceased's death was inflicted by the 1st accused. As for the incidents of assaults at the Zone Nenas, football field and main gate which involves 2nd, 3rd, 4th, 5th and 7th accused persons, it could not have caused the death of the deceased. Thus, when all the co-accused were acquitted and only the 1st accused was ordered to enter upon his defence, the 1st accused must be aware of the evidence against him. This is especially so when he was represented by counsel.

[29] We have scrutinised the record of proceedings with care and we are satisfied that the 1st accused was in no way misled or prejudiced by the non amendment of the charge. The way the defence was presented make it amply clear that the 1st accused has fully appreciated the nature of the charge against him and the nature of the prosecution's case. He had elected to give evidence on oath and in his defence, he alleged that the deceased was already in a very weak condition even before he entered the UKK room as he had to be assisted to walk to the room. However, the learned trial judge found as a fact that there was no evidence to suggest that the deceased was already seriously injured prior to him being brought to the room. On the contrary, the learned trial judge found that there was evidence of several witnesses such as PW7, PW9 and PW10 that the deceased was able to walk on his own, in a normal manner and unaided to the UKK room. The Court of Appeal affirmed the learned trial judge's finding of facts. But this was not an issue before us. Mr. Karpal Singh for obvious reason decided not to proceed with this issue.

[30] The only complaint by Mr. Karpal Singh was that had the charge been amended, the accused would have had the opportunity to recall or re-summon and examine any witness and to call further evidence which may be material to his defence. But we are of the view that even without the charge being amended, the 1st accused is not precluded from recalling or re-summons any witness or to call for further evidence. Cases have shown that even if a charge is amended, but where an accused person is represented by counsel, the trial judge is not obliged to inform the accused person of his right under s. 162 to recall any of the witnesses for the prosecution. In *Moosa Abdul Rahman v. The State of Kerala* [1982] Cr LJ 1384, the full bench of the High Court of Kerala held that s. 217 of the Indian Criminal Procedure Code 1974 (which is in *pari materia* with our s. 162):

... does not cast a duty or obligation on the court to enquire of the prosecution or the accused whether they would like to recall or re-summon the witnesses ... or to call any further witnesses. The omission of the court to 'enquire of the prosecution or the accused whether they would like to exercise the right of re-calling or re-summons the witnesses would not result in any procedural illegality'.

A [31] The above proposition was accepted by the Court of Appeal
in *Msimanga Lesaly*. Gopal Sri Ram JCA (as he then was) held
that where an accused is represented by counsel it is unnecessary
for the court to draw counsel's attention to s. 162 of the Criminal
B Procedure Code or to inquire whether counsel intends to exercise
the right conferred by the section.

[32] We endorsed the above view. In the present case, the 1st
accused was represented by counsel. Even though the charge was
not amended, there is nothing to prevent the defence from recalling
C or re-summoning any witness or to call further evidence. This was
not done. Thus, the question of miscarriage of justice, as advanced
by Mr. Karpal Singh does not arise at all.

[33] In conclusion, it is our considered view that the omission on
D the part of the trial judge to amend the charge either at the close
of the prosecution's case or at the close of the defence's case, so
as to delete any reference in the charge to the co-accused and to
s. 35 of the Penal Code did not cause any prejudice or injustice to
the 1st accused. Obviously it does not render the charge bad against
E the 1st accused. The fact that the other co-accused have been
acquitted, has no bearing upon the case against the 1st accused.
Accordingly, there was nothing irregular as regard the conviction of
the 1st accused on the charge of murder.

F [34] For the above said reasons, we dismiss the appeal of the 1st
accused. The conviction and sentence is affirmed.

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